

Lorimar Productions, Inc. and Production Office Coordinators and Accountants Guild Local 717, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada. Case 31-CA-12685

21 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 8 December 1982, the General Counsel of the National Labor Relations Board issued a complaint 20 January 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 12 November 1981, following a Board election in Case 31-RC-4957, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 2 September 1982 the Company has refused to bargain with the Union. On 14 February 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 28 March 1983 the General Counsel filed a Motion for Summary Judgment. On 30 March 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Respondent denies that the unit of employees certified in Case 31-RC-4957 is appropriate for purposes of collective bargaining; that a majority of the Respondent's employees selected the Union as their exclusive collective-bargaining representative; that the Union has been, since 12 November 1981, the exclusive representative of certain of the Respondent's employees; that the Union has requested and is requesting the Respondent to bargain collectively with it; that the Respondent has, since 2 September 1982, refused to bargain collectively with the

Union; and that the Respondent has violated the Act by its refusal to bargain. The Respondent's answer also contains the following affirmative defenses: the Union did not make a clear and proper demand to bargain on behalf of the Respondent's estimators;¹ the Respondent had a good-faith doubt that the Union represented a majority of the Respondent's estimators; the Union's certification should be invalidated because (a) estimators are confidential employees, (b) estimators are managerial employees, (c) estimators are technical employees or otherwise constitute an inappropriate unit, (d) the election took place before the Board ruled on the Respondent's request for review, (e) the election was unfair because it was not secret, and because of material misrepresentations or "incorrect impressions" created by the Union among employees, (f) the election was held before the unit was determined, (g) the official NLRB notice misrepresented the bargaining unit, (h) the manner in which the election was conducted violated the employees' rights under the 1, 5, and 14 amendments of the United States Constitution, and (i) the objections were improperly overruled without a hearing.

In its response to the Notice to Show Cause, the Respondent requests the Board to reconsider the application of Section 102.67(b) of the Board's Rules and Regulations, which permits an election to be conducted while a party's request for review of a Regional Director's order is pending with the Board.² The Respondent also challenges the Re-

¹ The Respondent contends that the Union never made a clear and proper demand for bargaining with respect to the estimators. However, by its letter dated 2 September 1982 the Union requested the Respondent to bargain collectively with the Union as the exclusive collective-bargaining representative of "the estimators (accountants)." In its 14 October letter the Union reiterated its 2 September "request to commence negotiations on behalf of the Accountants (Estimators)" and in its 2 November letter the Union repeated its request "to commence negotiations on behalf of the estimators." (Although the Respondent asserts that it did not receive the Union's 2 September letter until a second copy of it was attached to the Union's 2 November bargaining demand, it is clear that the Respondent timely received the Union's 14 October and 2 November demands.) The Respondent replied to the bargaining demands in a letter dated 11 November in which it asserted that "the identity of the classifications of employees on whose behalf [the Union is] seeking to bargain is confusing and inconsistent." Thus, the Respondent stated that it "denied" the Union's bargaining request. We find that not only was the Union clear in making its request to bargain on behalf of the estimators, but also that its demand was consistent with the Board's certification of the Union as the exclusive bargaining representative of "all estimators of the [Respondent] employed at its facilities located at 10202 Washington Boulevard, Culver City, California, and at 4000 Warner Boulevard, Burbank, California." Accordingly, we find that the Union has made a clear and proper demand for bargaining.

² The relevant portion of Sec. 102.67(b) provides: "... if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision."

gional Director's decision to overrule its objections and to certify the Union without conducting a hearing. The General Counsel asserts that the Respondent seeks to relitigate issues that were raised and decided in the representation case. We agree with the General Counsel.

Our review of the record, including the record in Case 31-RC-4957, reveals that, on a petition duly filed under Section 9(c) of the Act, a representation hearing was held before a hearing officer of the National Labor Relations Board. Thereafter, the Regional Director issued his Decision and Direction of Election on 27 January 1981. The Respondent filed with the Board a request for review of the Regional Director's Decision and Direction of Election in which it challenged, inter alia, the Regional Director's finding that the unit of production coordinators and estimators constituted an appropriate unit. By telegraphic order of 25 February 1981 the Board granted the Respondent's request for review on the limited issue of whether the production coordinators should be included in the appropriate unit; the request was denied in all other respects.

On 26 February 1981 a secret-ballot election was conducted and, pursuant to Section 102.67 of the Board's Rules and Regulations, the ballots were impounded and segregated pending the Board's decision on the request for review. On 1 September 1981 the Board issued a Decision on Review in which the production coordinators were excluded from the appropriate bargaining unit.³ Thereafter, the remaining ballots were opened and counted and a tally of ballots issued showing that the Union won the election. The Respondent filed timely objections to conduct affecting the results of the election alleging, inter alia, that the unit was inappropriate, that the election was invalid because of the Board's application of Section 102.67 of the Board's Rules and Regulations, and that the employees were not able to cast secret ballots.

On 12 November 1981, following an investigation of the Respondent's objections, the Regional Director issued a Supplemental Decision and Certification of Representative in which he overruled the Respondent's objections and certified the Union.⁴ The Respondent filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative, which request the Union opposed. By telegraphic order 19 February 1982, the Board denied the Respondent's request for review. It thus appears that the Respond-

ent is attempting to raise issues that were raised in the underlying representation case.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.⁵

On the entire record, the Board makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Company is a California corporation engaged in the production of motion pictures and television programs in the Los Angeles, California area. The Respondent annually sells goods or provides services valued in excess of \$50,000 to firms located within the State of California, which firms, in turn, meet one of the Board's direct standards for assertion of jurisdiction. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held 26 February 1981 the Union was certified 12 November 1981 as the collective-bargaining representative of the employees in the following appropriate unit:

All estimators of the Employer employed at its facilities located at 10202 Washington Boulevard, Culver City, California, and at 4000 Warner Boulevard, Burbank, California; excluding all other employees, production coord-

³ *Lorimar Productions*, 257 NLRB 1138 (1981).

⁴ On 17 November 1981 the Regional Director issued an erratum correcting inadvertent errors in portions of the supplemental decision.

⁵ Chairman Dotson and Member Hunter did not participate in the underlying representation proceeding. They adopt this finding for institutional reasons.

dinators, professional employees, office clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 2 September 1982 and at all times thereafter, including 14 October 1982 and 2 November 1982, the Union has requested the Company to bargain, and since 11 November 1982⁶ the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 11 November 1982 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Lorimar Productions, Inc., Culver City and Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁶ The complaint alleges that the Respondent has refused to bargain with the Union since 2 September 1982. It was not until 11 November 1982, however, that the Respondent informed the Union that it would not bargain. Accordingly, we find that the Respondent refused to bargain with the Union as of that date.

(a) Refusing to bargain with Production Office Coordinators and Accountants Guild Local 717, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All estimators of the Employer employed at its facilities located at 10202 Washington Boulevard, Culver City, California, and at 4000 Warner Boulevard, Burbank, California; excluding all other employees, production coordinators, professional employees, office clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Post at its facility at 10202 Washington Boulevard, Culver City, California, and 4000 Warner Boulevard, Burbank, California, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Production Office Coordinators and Accountants Guild Local 717, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All estimators of the Employer employed at its facilities located at 10202 Washington Boulevard, Culver City, California, and at 4000 Warner Boulevard, Burbank, California; excluding all other employees, production coordinators, professional employees, office clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

LORIMAR PRODUCTIONS, INC.